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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 655

BEACHVIEW BROADCASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	5
Reasons for Allowance of the Writ	13
Conclusion	27

Index to Appendix

(Separately Presented)

Initial Decision of Hearing Examiner (December 29, 1954)	1a
I. Preliminary Statement	1a
II. Findings of Fact—Composition of the applicants—	
Beachview	2a
Portsmouth	11a
III. Findings of Fact—Programming	35a
IV. Conclusions (Remarks)	50a
V. Conclusions (Final)	53a
Order Governing Course of Proceeding	54a
Beachview Broadcasting Corporation	54a
Portsmouth Radio Corporation	63a
Supplemental Order Governing Course of Proceeding	68a
Order Adding Points of Reliance	72a

Page

Decision of the Federal Communications Commission (May 31, 1955) 73a

Preliminary Statement 73a

The Applicants:
Beachview Broadcasting Corporation 76a
Portsmouth Radio Corporation 90a

Past Performance of Portsmouth 106a
Preparation for Television 109a
Policies 112a
Proposed Programming 114a
Local Religious Programs 116a
News 117a
Discussion 119a
Talks 121a
Agricultural 124a
Educational 125a
Entertainment 126a
Studios 132a
Staff 132a
Equipment 135a
Broadcast Facilities 135a
Conclusions 136a

Local Residence 138a
Civic Activities 139a
Past Performance of Station WAVY 140a
Broadcast Experience 141a
Background of Stockholders 143a
Integration of Ownership and Management 145a
Corporate Structure 149a
Program Policies and Proposals 153a
Staff 157a
Diversification of Communications Media 158a
Other Matters 160a
Summation 163a

Appendix A Order Governing Course of Proceeding 166a

Supplemental Order Governing Course of Proceeding 166a

Order Adding Points of Reliance 166a

Page

Memorandum Opinion and Order of the Federal Communications Commission (October 8, 1956) 166a
Memorandum Opinion and Order of the Federal Communications Commission (May 2, 1957) 171a
Letter of the Federal Communications Commission (June 29, 1957) 182a
Opinion of the United States Court of Appeals for the District of Columbia Circuit (September 18, 1958) 183a
Judgment of the United States Court of Appeals for the District of Columbia Circuit (September 18, 1958) 186a
Order of the United States Court of Appeals for the District of Columbia Circuit (October 22, 1958) .. 186a

TABLE OF CITATIONS

CASES:

Aladdin Radio and Television, Inc., 9 Pike & Fischer Radio Reg. 1 (1953) 24
Ashback Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (1945) 15
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 14
Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86 (1953) 15, 17, 22
Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930) 16
Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933) 14, 16
KFAB Broadcasting Co., 12 Pike & Fischer Radio Reg. 317 (1956) 24
KTBS, Inc., 10 Pike & Fischer Radio Reg. 811 (1955) 24
McClatchy Broadcasting Co. v. Federal Communications Commission, 99 U.S. App. D.C. 195, 199, 239 F. 2d 15, 19 (1956), cert. den. 353 U.S. 918 (1957) 21, 23, 25
National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 14, 15
National Labor Relations Board v. Mall Tool Co., 119 F. 2d 700 (7th Cir., 1941) 25

Page

New York Central Securities Corporation v. United States, 287 U.S. 12 (1932) 15

Pinellas Broadcasting Company v. Federal Communications Commission, 97 U.S. App. D.C. 236, 230 F. 2d 204 (1956), cert. den. 353 U.S. 918 (1957) 21, 23

Scripps Howard Radio, Inc. v. Federal Communications Commission, 87 U.S. App. D.C. 13, 189 F. 2d 677 (1951), cert. den. 342 U.S. 830 (1951) 23

Tampa Times Co., 10 Pike & Fischer Radio Reg. 77 (1955) 24

Tampa Times Company v. Federal Communications Commission, 97 U.S. App. D.C. 256, 230 F. 2d. 224 (1956) 18

Tennessee Television, Inc. v. Federal Communications Commission, ... U.S. App. D.C. ..... (Nos. 13168, 13507, 13905) ..... F. 2d ..... 17 Pike & Fischer Radio Reg. 2170 (Nov. 28, 1958) 19, 23

The Radio Station WHF Co., 11 Pike & Fischer Radio Reg. 1 (1955) 19, 24

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) 18, 26

WHDH, Inc., 22 F.C.C. Rep. 761, 13 Pike & Fischer Radio Reg. 507 (1957) 16

STATUTES:

Administrative Procedure Act, Act of June 11, 1946, Section 10 e, 324, 60 Stat. 243, 5 U.S.C. 1009 ..... 4, 12, 17, 26

Judiciary and Judicial Procedure, Act of June 25, 1948, Title 28, Section 1254(1), c. 646, 62 Stat. 928, 28 U.S.C. § 1254(1) 2

Communications Act of 1934, Act of June 19, 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 et seq. 14, 15, 17, 21

Section 307 (a), (d) 14

Section 309 (a), (b) 3, 5, 14

Section 310 14

Section 312 14

Section 402 (b), (c), (g), (j) 2, 12, 17, 18

Radio Act of 1927, Section 46, c. 169, 44 Stat. 1169, as amended 15, 16

Rules: Page

Supreme Court of the United States, Rule 23 (1) (c) 1

Federal Communications Commission, Rules and Regulations, Section 1.841, 18 Fed. Reg. 939 (Feb. 17, 1953), rescinded 19 Fed. Reg. 443, 445 (July 20, 1954) 6

Miscellaneous:

Cardozo, The Growth of the Law (Sleeted Writings) 27

Comment, "Diversification and the Public Interest: Administrative Responsibility of the FCC," 66 Yale Law Jour. 365 (Jan., 1957) 23

Gottlieb, "The Criteria Employed by the Federal Communications Commission in Granting Mutually Exclusive Applications for Television Facilities," 45 Georgetown Law Jour. 266 (Winter, 1956-1957) 22

"Independent Regulatory Commissions," Report of the Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, House Rep. No. 2711, 85th Cong., 2d Sess. (1959) 14

Ratigan, "FCC Standards or Comparative Criteria as Applied in 14 Representative Comparative TV Proceedings" (Legislative Reference Service, Library of Congress 1958), House Rep. No. 2711, 85th Cong. 2d Sess., p. 38 (1959) 22

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v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on September 18, 1858, and the order of the Court denying a petition for rehearing *en banc*, entered on October 22, 1958.

OPINIONS BELOW

The initial decision of the Hearing Examiner is unreported, and appears at pages 1a-73a of the appendix.* The decision of the Federal Communica-

* Pursuant to Rule 23(1)(c) of the Rules of this Court, for convenience the appendix to the petition is separately presented.

tions Commission is reported at 11 Pike & Fischer Radio Reg. 939 (1955), and appears at pages 73a-166a of the appendix. The memorandum opinion and order of the Commission released on October 8, 1956, is reported at 11 Pike & Fischer Radio Reg. 972-l (1956), and appears at pages 166a-171a of the appendix. The memorandum opinion and order of the Commission released on May 2, 1957, is reported at 22 F. C. C. Rep. 989, 11 Pike & Fischer Radio Reg. 972-o (1957), and appears at pages 171a-181a of the appendix.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported, and appears at pages 183a-186a of the appendix. The order of the Court of Appeals denying a petition for rehearing *en banc* appears at page 186a of the appendix.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on September 18, 1958. An order denying a petition for rehearing *en banc* was entered by the Court of Appeals on October 22, 1958.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C., § 1254(1), and Section 402(j) of the Communications Act of 1934, Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U. S. C., § 402(j).

QUESTIONS PRESENTED

1. Is the scope of judicial review of a regulatory agency's decision limited to a judicial determination that a "rational" basis has been stated for the agency's

action, so as to render the reviewing Court powerless to restrain the agency from shifting from case to case the character and emphasis of the comparative criteria it employs in selecting between competing applicants for an agency authorization, obliterating any predictable pattern of decision?

2. Where the Federal Communications Commission has established various comparative criteria as the public interest factors which it will apply in choosing between competing applicants for a broadcast facility, may the Commission without prior notice decide between applicants according to altered criteria, different in nature and specifications, without affording each of the parties an opportunity to present its case in the light of the criteria actually to be applied, and without justifying the changed criteria in terms of the statutory public interest standard?

3. If the Hearing Examiner and a minority of the members of the Commission who preferred one of the applicants for a new television broadcast station were "clearly right," can there exist a "rational basis" which will compel a reviewing Court nevertheless to affirm the decision of a majority of the Commissioners in favor of another applicant?

STATUTES INVOLVED

Section 309(a) and (b) of the Communications Act of 1934, Act of June 19, 1934, c. 652, 48 Stat. 1085, as amended, 47 U. S. C. § 309(a), (b):

> (a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * *

Section 10(e) of the Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 243; 5 U. S. C., § 1009(e):

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capri-

ous, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 or 8 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

Beachview Broadcasting Corporation (hereinafter sometimes called Beachview), petitioner herein, and Portsmouth Radio Corporation (hereinafter sometimes called Portsmouth) * each filed an application before the Federal Communications Commission for a construction permit for a new commercial television broadcast station to operate on Channel 10 in Norfolk-Newport News-Portsmouth, Virginia. Having found that the applications were mutually exclusive, and that a hearing was therefore mandatory under the provisions of Section 309(b) of the Communications Act of 1934,[1] the Commission designated the applica-

* During pendency of the appeal, Portsmouth Radio Corporation changed its name to Tidewater Teleradio, Inc.

[1] Act of June 19, 1934, c. 652, 48 Stat. 1085, as amended, 47 U.S.C., § 309(b).

tions for hearing in a consolidated proceeding in order to determine on a comparative basis which applicant would better serve the public interest, convenience and necessity.

Under the so-called "points of reliance" procedure then in effect, each applicant was required in advance of hearing to set forth in detail the points under established comparative criteria upon which it relied as showing significant differences between the parties which would merit the award of positive points of preference or negative points as demerits to the other party. After several pre-hearing conferences, during which the Examiner passed on the proposed points of reliance submitted by the parties, the points found acceptable were set forth in an "Order Governing Course of Proceeding," later amended, which served to delimit the issues of the hearing. (App., pp. 54a-73a.)

[2] Section 1.841, 18 Fed. Reg. 939 (Feb. 17, 1953), later rescinded, 19 Fed. Reg. 443, 445 (July 20, 1954).

[3] In the disposition over the years of comparative hearings where competing applicants seek radio or television broadcast facilities, the Commission has developed various aids, factors, or "criteria" which it recognizes must guide its determinations in adjudicatory proceedings from the public interest viewpoint. *WHDH, Inc.*, 22 F.C.C. Rep. 761, 858, par. 3, 13 Pike & Fischer Radio Reg. 507, 566, par. 3 (1957). Among the comparative criteria are included such factors as local residence, participation in the civic affairs of the community, the diversification of occupations and backgrounds of the principals, the integration of ownership and management in the day-to-day operation of the station, broadcast experience, past broadcast performance, planning and preparation, program policies and proposals, studios and equipment, other interests of the applicants affecting the concentration or diversification of the media of mass communications, and the like.

At the conclusion of the comparative hearing, the Hearing Examiner issued an initial decision in which he proposed that the application of Beachview for Channel 10 be granted and the application of Portsmouth for the same facility be denied. (App., pp. 1a-53a). No points of preference were awarded to Portsmouth. Beachview was awarded a positive comparative point of preference because of superior integration of ownership and management (App., pp. 52a-53a, pars. 107, 3, 4), and a negative point of preference because of the characteristics of a voting trust which had been established by Portsmouth (App., p. 53a, pars. 1, 4), the Examiners ruling that the "abandonment of their rights and duties by 50 Portsmouth stockholders to 11 voting trustees is contrary to the public interest." (App., p. 53a, pars. 2, 4).

Beachview showed that all eight of its stockholders would participate in the station's day-to-day operation (App., pp. 2a-10a, pars. 4-13), with its 77.77% stockholder to devote 90% of his time to the station's operation (App., pp. 3a-4a, par. 5), and three other stockholders, representing an additional 11.12% ownership interest, to be integrated on a full-time basis. (App., pp. 4a-5a, 8a-10a, pars. 6, 12, 13). Under the voting trust of Portsmouth, 50 of Portsmouth's 61 stockholders, owning 62.67% of Portsmouth's voting stock, surrendered all of their voting (management) rights to the remaining stockholders as trustees, who together owned only 37.33% of Portsmouth's stock in their own right. (App., pp. 20a-21a, 51a, pars. 32, 35, 105). Of the eleven Portsmouth trustees, only two trustees proposed to participate in full-time day-to-day operation (App., pp. 11a-13a, pars. 16, 17); the other nine trustees each proposing to spend 20 hours

or less per week at the station serving on advisory committees. (App., pp. 13a-18a, pars. 18-26). Although the 50 non-trustee stockholders were substantial owners of Portsmouth, only a half-dozen were to participate in management, and these only in slight to moderate degree. (App., p. 52a, par. 107).

The Hearing Examiner held that the 50 Portsmouth stockholders had thereby successfully placed a barricade between themselves and the corporation, defeating the "usual cause and effect relationship between ownership and management" and "deserting their rights and duties to a well-nigh irrevocable trust." (App., p. 51a, par. 105). He observed that a resolution of Portsmouth directors and stockholders in practical effect would "'clean the slate' for the voting trust agreement which with finality precludes any prospective participation in the affairs of the corporation" by non-trustee stockholders. (App., pp. 51a-52a, par. 106), and that the voting trust agreement made it possible for the eleven voting trustees to gain control of Portsmouth under circumstances which were in turn within the control of the trustees. (App., p. 53a, par. 108).

Exceptions to the initial decision were filed by both parties, and oral argument was held before the Commission *en banc*. On May 29, 1956, the Commission issued a decision in which it reversed the initial decision of the Hearing Examiner, granted the application of Portsmouth, and denied the mutually exclusive application of Beachview. (App., pp. 53a-165a). Of the seven members of the Commission, three voted for Portsmouth, two voted for Beachview, one did not participate, and one abstained from voting. (App., p. 73a). The Commission rejected the points of pref-

erence which the Hearing Examiner had awarded to Beachview, substituted a "minor preference" to Beachview for greater diversification of communications interests, but favored a grant to Portsmouth because of comparative differences in which it found Portsmouth prevailed in civic participation and past broadcast record. (App., p. 165a, par. 40).

In striking down Beachview's point of preference for integration of ownership and management, the Commission ruled: (1) that it must look not to the degree of participation in station management by the owners of the beneficial interest in the applicant, but to the activities of the eleven voting trustees owning 37.33% of the corporation's stock with the power going with stock ownership (App., pp. 146a-147a, par. 18); and (2) that the Examiner's conclusion had "failed to evaluate adequately the significance which should attach qualitatively" to the participation and television experience of Carl J. Burkland, Portsmouth's vice-president, director, trustee, and proposed station manager. (App., p. 149a, par. 19). Burkland had, however, only a 1.64% stock ownership interest, with an option to purchase an additional interest of one-third of 21.66%, of Portsmouth's voting stock. (App., p. 95a, par 28 and fn. 15).

The Commission likewise held that there was no evidence that the eleven voting trustees intended to obtain control of Portsmouth or that the fifty non-voting stockholders regarded the proposed station solely as a business investment to the exclusion of the public interest (App., pp. 151a-153a, pars. 23-25), although the Commission had found that the latter would not participate in decisions affecting Portsmouth's proposed operation, and would not exercise any degree of

stockholder control under the voting trust. (App., p. 106a, par. 42; p. 152a, par. 25). Noting that it had made an *ex parte* determination before hearing that the voting trust was in the public interest, the Commission ruled that the trust was not illegal *per se*. (App., pp. 151a-153a, par. 25 and fn. 29).

Beachview had asserted as a point of reliance that it was entitled to a point of preference because, unlike Portsmouth, it owned no radio facility or other medium of mass communication, and a grant to Portsmouth would place all five television channels in the area in the hands of licensees of radio stations. (App., pp. 158a-159a, par. 33). Taking note, like the Examiner (App., pp. 17a-18a, par. 99), of the number of broadcast facilities in the area, the Commission held that "a grant to Portsmouth would not tend toward concentration of control over mass media of any significant degree," but gave Beachview a preference "of minor weight" because there would be more diversification in the ownership of communications media in a grant to Beachview. (App., pp. 159a-160a, par. 34).

Portsmouth's ownership of a 5,000-watt, full-time regional radio station was also the basis for the Commission's award of a point of preference to Portsmouth for its past broadcast record, Beachview having no past record as a Commission licensee. (App., p. 141a, par. 11). The Examiner had refused to grant a preference on this point because of the short period of Portsmouth's operation of the radio station and the delay it encountered in making changes in the station's operation, and had concluded, "No basic historical facts of even slight consequence tending to support the point of reliance were established by exhibit

or testimony." (App., p. 47a, par. 98). The Commission, however, granted Portsmouth a preference on this point of reliance, although it stated that the preference was "not of great force in light of the brief period covered by such record (and recent acquisition thereof)", (App., p. 141a, par. 11), and "a minor one." (App., pp. 163a-164a, par. 38).

With respect to civic activities, the other area where Portsmouth was found by the Commission to merit a preference (App., p. 165a, par. 10), the Examiner had found that "the backgrounds of the principals of each applicant are so commendably broad and their civic connections so extended that the value of comparing them to determine superiority vanishes." (App., p. 48a, par. 100). Although the Commission found that five of Beachview's eight stockholders, representing an 88.89% ownership interest, had "each made substantial contributions to civic, charitable and other causes," and a sixth stockholder with a 10.03% interest had shown limited civic activity, (App., p. 76a, par. 7; p. 139a, par. 8), a controlling preference was granted to Portsmouth because the activities of its trustees showed the "assumption of responsibilities" in such causes "of the highest order". (App., p. 140a, par. 8). One of the trustees, Carl J. Burkland, a 1.61% stockholder whose "qualitative" experience had been a basic factor in the Commission's refusal to award points of preference to Beachview for integration of ownership and management (App., p. 149a, par. 19) and for broadcast experience (App., pp. 142a-143a, par. 13), had lived in the area for only five months prior to the commencement of the hearing, and showed negligible civic activities in the area of membership in two sales clubs and two Chambers of Commerce. (App., pp. 96a-97a, par. 30).

Case No. 13,583 in the United States Court of Appeals for the District of Columbia Circuit was an appeal timely filed by Beachview from the Commission's decision of May 31, 1956, (App., pp. 73a-165a) and a memorandum opinion and order of the Commission released on October 8, 1956, (App., pp. 166a-171a), denying a petition for reconsideration. Case No. 13,913 in the Court below was an appeal from a second memorandum opinion and order of the Commission, (App., pp. 171a-181a) denying Beachview's petition for further hearing, and related pleadings, alleging newly discovered evidence reflecting on Portsmouth's qualifications. Case No. 14,001 in the Court below was an appeal from the grant by the Commission by letter dated June 20, 1957, (App., pp. 182a-183a) of an application by Portsmouth for an extension of time to complete construction. The jurisdiction of the Court of Appeals was invoked pursuant to the provisions of Section 402(b) of the Communications Act of 1934,[3] and Section 10 of the Administrative Procedure Act.[4] The three appeals were consolidated for briefing and argument.

By opinion (App., pp. 183a-186a) and judgment (App., p. 186a) entered on September 18, 1958, a panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the decision and orders of the Commission, holding *per curiam* that it could find nothing arbitrary, capricious, irrational or unreasonable in the Commission's discussion of the criteria applied. The Court stated:

[3] Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U.S.C., § 402(b).

[4] Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C., § 1009.

> "The situation is clearly one in which the Congress has confided the function of decision in the Commission. The limited authority of the court in reviewing the matter does not touch any of the choices made by the Commission and alleged by appellant to have been erroneous. It may be that the Congress has confided too great power in the agency. But the power is in the Congress to dispense, and it is not within the judicial function to superimpose a court's judgment on regulatory measures such as those here involved."

Chief Judge Edgerton, concurring in the result, stated:

> "I think the hearing examiner and the minority of the Commission, who preferred Beachview, were clearly right, but I cannot say there was no rational basis for preferring Portsmouth."

A timely petition by Beachview for rehearing *en banc* was filed on October 3, 1958, and was denied by the Court, *per curiam*, by order entered on October 22, 1958. (App., p. 186a). Circuit Judge Miller stated he would grant the petition. Circuit Judge Bazelon stated:

> "I vote to grant the petition for rehearing in banc in order to reconsider this court's recent rulings which appear to render us powerless to restrain the Commission from employing shifting emphasis of comparative criteria obliterating any predictable pattern of decision."

REASONS FOR ALLOWANCE OF THE WRIT

The decision here sought to be reviewed would deny the validity of this Court's judgment that the "public interest, convenience, or necessity" provides a standard concrete and definite enough to guide and limit the determinations of a regulatory agency and to pro-

vide a firm basis for judicial review.[6] It would give substance to the recent pronouncement of the Harris Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce:[7] "The Communications Act, as amended, does not provide definitive criteria to guide the Commission in selecting the best qualified applicant among several competing for a particular channel or facility."

The statutory standard of the "public interest, convenience, or necessity" of the Communications Act of 1934[8] has been upheld by this Court as the touchstone provided by the Congress to govern the exercise of the licensing power of the Federal Communications Commission,[9] upon the premise that the criterion "is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power,"[10] but "is as concrete as the complicated factors for such a field of delegated authority permit."[11] "It is a mistaken assumption that this is a mere general reference to public welfare without any standards to guide determinations. The purpose of the Act, the requirements it

[6] *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-216, 226 (1943).

[7] House Rep. No. 2711, 85th Cong., 2d Sess., p. 37 (1959).

[8] Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended, 47 U.S.C., §§ 307 (a), (d), 309 (a), 310, 312.

[9] *National Broadcasting Co. v. United States*, note 6 *supra*, 319 U.S. at 215-216.

[10] *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

[11] *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

imposes, and the context of the provision in question shows the contrary."[12]

Thus, in choosing between two competing applicants for the same broadcast facilities, the Commission has not been "left at large" in performing its duty, but since the very inception of Federal regulation of radio has been governed by comparative considerations as to the services to be rendered in the public interest, to be determined after a full evidentiary hearing upon the mutually-exclusive applications in a consolidated proceeding.[13]

Although the Congress might have made the Commission's exercise of its licensing power not reviewable, it chose not to leave to the unbounded discretion of the regulatory body the final interpretation of the measure of its licensing authority and responsibility under the Communications Act of 1934, as amended. In the original scheme of regulation under Section 16 of the Radio Act of 1927, the Court of Appeals was authorized, in reviewing an action of the Federal Radio Commission, the predecessor of the Federal Communications Commission, to "alter or revise the decision appealed from and enter such judgment as to it may seem just."[14] Thereafter, since the power

[12] *New York Central Securities Corporation* v. *United States*, 287 U.S. 12, 24 (1932), quoted with approval in *National Broadcasting Co.* v. *United States*, note 6 *supra*, 319 U.S. at 226.

[13] *Id.*, 319 U.S. at 215-217.

[14] *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

[15] *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953).

[16] Section 16, Radio Act of 1927, c. 169, 44 Stat. 1169.

thus granted to the Court of Appeals was administrative rather than judicial, so as to preclude judicial review of the appellate decision by this Court.[17] Section 16 was amended[18] to limit review expressly to "questions of law" and to provide "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary and capricious."[19]

Judicial review did not, however, divest the Court of Appeals of its responsibility to ascertain that administrative action comported with the statutory standard:[20]

> "* * * The powers of the commission were defined, and definition is limitation. Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision. These are the questions of law upon which the court is to pass. * * *"

With the formulation in 1934 of a unified and comprehensive regulatory system for the communications industry, the provisions for judicial review of Section 16 of the Radio Act of 1927 were absorbed into

[17] *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 467 (1930).

[18] Act of July 1, 1930, c. 788, 46 Stat. 844.

[19] *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, note 10, *supra*, 289 U.S. at 274-275.

[20] *Id.*, at 276.

Section 402(c) of the Communications Act of 1934.[21] Thereafter, the provisions for judicial review of Section 10(e) of the Administrative Procedure Act[22] were substituted through incorporation by reference when the procedural provisions of the Communications Act were revised by the McFarland Amendments of 1952.[23]

Again, it could not have been intended to restrict the Court of Appeals in the exercise of the full scope of judicial review. In *Federal Communications Commission* v. *RCA Communications, Inc.*,[24] this Court refused to accept a recitation by the Commission "in an abstract, sterile way" that a particular criterion may have beneficial effects, where the Commission has not "sufficiently laid bare its mind to enable us to perform our reviewing function," after having stated:

> "* * * Ours is not the duty of reviewing determinations of 'fact,' in the narrow, colloquial scope of that concept. Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vagueish, penumbral bounds expressed by the standard of 'public interest.' It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest."

Despite this Court's admonition, however, that "Reviewing courts must be influenced by a feeling that

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[21] Act of June 7, 1934, c. 426, 48 Stat. 926, as amended.

[22] Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C., § 1009 (e).

[23] Act of July 16, 1952, c. 879, Sec. 14, 66 Stat. 718, 47 U.S.C., § 402(g).

[24] Note 15 *supra*; 346 U.S. at 91, 94 and fn. 9.

they are not to abdicate the conventional judicial function,"[25] the judicial review of Commission decisions in comparative proceedings, which the Congress has assigned to the United States Court of Appeals for the District of Columbia Circuit,[26] has typically been characterized by the Court's refusal to assume judicial responsibility to require administrative adherence to the legislative limitations of power and an orderly pattern of decision. It has reached its apogee in the case here sought to be reviewed. The scope of judicial review is now an issue ripe for settlement by this Court, through a decision which crystallizes the degree of administrative license which a statutory court of review would afford a federal regulatory agency in terms bound to a standard of the public interest:

(1) The Court of Appeals has abandoned the requirement that the premises or bases for the Commission's decision be related to the *external* statutory standard of the public interest, and will ascertain only whether the Commission's decision is *internally* consistent, whether the final conclusion flows rationally from basic facts to ultimate facts, without regard to the measure of its responsiveness to the legislative mandate. In *Tampa Times Company* v. *Federal Communications Commission*,[27] the Court had stated: "So long as it [the Commission] observes all procedural requirements, considers the issues, reaches reasoned conclusions, and renders reasoned judgment, courts cannot superimpose their opinions upon these mat-

[25] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490 (1951).

[26] Section 402(b)(1) of the Communications Act of 1934, Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U.S.C., § 402(b)(1).

[27] 97 U.S. App. D.C. 256, 259, 230 F. 2d 224, 227 (1956).

ters." "It may be," the Court now declares, "that the Congress has confided too great power in the agency. But the power is in the Congress to dispense, and it is not within the judicial function to superimpose a court's judgment on regulatory measures such as those here involved." (App., p. 185a).

Only if the public interest standard is ignored, is it possible to reconcile the policy embodied in the criterion of ownership-management integration, that the parties who manage and control a station should be "those who have the keenest interest in the success of the enterprise and who are held responsible by the Commission for the operation of the station in the public interest,"[28] with the Commission's action in finding no significance in the abandonment of management rights by 50 stockholders, owning 62.67% of the applicant's voting stock, to 11 other stockholders holding a 37.33% stock interest, only two of whom would participate in full-time operation. Only by the substantial nullification of the established diversification principle, that the public interest is best served by the promotion of the decentralization of ownership of the media of public information, is it possible to permit the award of a mere token "minor" preference to Beachview, the only applicant to offer a new voice to the area unaffiliated with other media of mass communication. Only by stripping the diversification principle of any significance is it possible to award a balancing minor preference to Portsmouth for its brief operation of another communications medium.[29] Only

[28] *The Radio Station KHF Co.*, 11 Pike & Fischer Radio Reg. 1, 103-104 (1955).

[29] Compare *Tennessee Television, Inc.* v. *Federal Communications Commission*, ... U.S. App. D.C. ..., Nos. 13168, 13507, 13905, ... F. 2d ..., 17 Pike & Fischer Radio Reg. 2170 (Nov. 28, 1958).

by the severance of the criteria employed from any relation to the ultimate statutory standard, is it possible to support a decision which gives controlling weight to the civic participation "of the highest order" of Portsmouth's principals, despite the "substantial contributions" found for Beachview stockholders with an 88.89% ownership interest, against Beachview's superiority in integration and diversification.

In these critical areas of decision, which go to the heart of the question whether the Commission has complied with the legislative standard which fixes the limits of its discretion, the Court has said, not that they are matters which can be reconciled with the statutory standard of the public interest, but "The limited authority of the court in reviewing the matter does not touch any of the choices made by the Commission and alleged by appellant to have been erroneous." (App., p. 185a).

(2) The Court of Appeals has left the regulatory agency free to select between competing applicants for a permit without regard to any stability or predictability in the application, or even the nature, of the criteria employed from case to case. The criteria applied in comparative proceedings presumably represent the considered judgment of an informed and expert tribunal of the factors of comparison which will determine which applicant will better serve the public interest, convenience, and necessity. Distilled from long experience in the administration of the regulatory statute and in the disposition of individual comparative hearing cases, they tend to assume the character of rules of law. As expressions of the expertise of the regulatory agency, they represent in large measure the very justification for the existence of special-

ized bodies charged with the administration of a particular branch of federal regulatory law.

Since the legislative standard itself as expressed in the Communications Act of 1934, as amended, has remained fixed, then it might have been supposed that the individual criteria, evolved as principles of communications law interpreting the standard, would change in significance and nature only if (1) there has been a change in conditions which gave expression to the criteria, or (2) the criteria have been discovered to be erroneous. Instead, the Commission has been given a free hand to shift the emphasis of comparative criteria from case to case, obliterating any predictable pattern of decision, without the necessity for explanation or justification. In *McClatchy Broadcasting Co. v. Federal Communications Commission*,[30] the Commission was held entitled to consider an individual criterion "in connection with all other relevant facts and to attach such significance to it as its judgment dictates." In *Pinellas Broadcasting Company v. Federal Communications Commission*,[31] the Commission was held authorized to change its views as to the dominant importance or evil of particular criteria in relation to the public interest: "All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary."

In practice, the Commission's evaluation of comparative criteria from case to case has not represented an evolution in the exercise of a considered judgment

[30] 99 U.S. App. D.C. 195, 198, 199, 239 F. 2d 15, 18, 19 (1956), cert. den. 353 U.S. 918 (1957).

[31] 97 U.S. App. D.C. 236, 238, 230 F. 2d 204, 206 (1956), cert. den. 350 U.S. 1007 (1956).

by the Commission, reflecting "the deposit of its experience, the disciplined feel of the expert,"[32] but chaos and confusion, without pattern, regularity, predictability, or discernable basic principles. In a study prepared for the Harris Special Subcommittee on Legislative Oversight entitled "FCC Standards or Comparative Criteria as Applied in 14 Representative Comparative TV Proceedings" (including the proceeding here sought to be reviewed), it was concluded: "In each case it would have been impossible to predict in advance the degree of weight which would be given to each of the foregoing criteria."[33]

Another writer has stated:[34]

> "'Since the advent of commercial television, there have been close to sixty cases involving comparative hearings of mutually-exclusive applications. These cases have not established a *modus operandi*. It is submitted that chaos now exists because of this apparent lack of consistent criteria which the members of the FCC have used in deciding these comparative cases.
>
> "A large segment of the legal profession in the District of Columbia devotes time to the preparation and presentation of comparative hearings before the FCC. * * * Yet it is believed that no matter how well versed and skilled they might be in this area of practice, none of them can even attempt to anticipate the outcome of a comparative hearing where the parties have already been ad-

[32] *Federal Communications Commission* v. *RCA Communications, Inc.*, note 15 *supra*, 346 U.S. at [illegible].

[33] House Rep. No. 2711, 85th Cong., 2d Sess., p. 38 (1959).

[34] Gottlieb, "The Criteria Employed by the Federal Communications Commission in Granting Mutually-Exclusive Applications for Television Facilities," 45 Georgetown Law Jour. 266, 267 (Winter, 1956-1957).

judged technically, legally, and financially qualified to operate the television station."

Inconsistency in the application of criteria has been particularly acute in the Commission's interpretation of diversification as a criterion.[35] One commentator has observed:[36]

"* * * In numerous cases the need for new, independent sources of dissemination has been subordinated to the criterion of 'greater broadcast experience.' The Commission has failed to show awareness that experience and diversification are often inversely related * * * *

"In other cases the Commission has been more aware of the public interest. On occasion it has completely reversed its policy of preferring the experienced applicant to the newcomer. The lack of experience of the unaffiliated candidate has been characterized as 'freshness of approach,' a qualification meriting preference over run-of-the-mill past experience. But the FCC's failure to develop a consistent affirmative policy has left the status of diversification unclear. And the Commission's repudiation of diversification in the cases

[35] Compare, e.g., *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 13, 189 F. 2d 677 (1951), cert. den. 342 U.S. 830 (1951) and *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 195, 199, 239 F. 2d 15, 19 (1956), cert. den. 353 U.S. 918 (1957), with *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 97 U.S. App. D.C. 236, 230 F. 2d 204 (1956), cert. den. 350 U.S. 1007 (1956) and *Tennessee Television, Inc.* v. *Federal Communications Commission*, — U.S. App. D.C. — (Nos. 13168, 13507, 13905, — F. 2d —, 17 Pike & Fischer Radio Reg. 2170 (Nov. 28, 1958).

[36] Comment, "Diversification and the Public Interest: Administrative Responsibility of the FCC," 66 Yale Law Jour. 365, 376-377, 379 (Jan., 1957).

> where that factor seemed most relevant has undermined the healthier precedents set in less extreme cases." [footnotes omitted]

The culmination of this process has been reached in the decision here sought to be reviewed, where the Commission has not only continued to shift the weight assigned to individual factors employed in reaching its decision, but has even altered the nature and characteristics of the criteria themselves, without prior notice or subsequent justification.

The integration of ownership and management as a criterion was completely subverted by considering the 11 voting trustees of Portsmouth as the applicant's 61 owners in applying the criterion, although the Commission had theretofore always properly looked to the participation in day-to-day operation of the persons *beneficially* interested in the applicant to insure licensee responsibility.[37] The Commission granted a crucial preference to Portsmouth for civic activities of its trustees "of the highest order," (App., p. 140a, par. 8), although Beachview's principal stockholders had also made "substantial contributions," (*Ibid.*), despite the established Commission policy against comparing civic activities inherently incapable of comparison.[38] In the area of diversification of the media of mass communications, the Commission granted only a minor

[37] *Aladdin Radio and Television Inc.*, 9 Pike & Fischer Radio Reg. 1, 38 (1953); *KTBS, Inc.*, 10 Pike & Fischer Radio Reg. 811, 871-872 (1955); *The Radio Station KHF Co.*, 11 Pike Fischer Radio Reg. 1, 103-104 (1955). "As a first condition, by the very definition of the term, the integration proposed must be by persons beneficially interested in the applicant, as owners thereof." *KFAB Broadcasting Co.*, 12 Pike & Fischer Radio Reg. 317, 391 (1956).

[38] *Tampa Times Co.*, 10 Pike & Fischer Radio Reg. 77, 196 (1955).

preference to Beachview because Portsmouth's regional radio broadcast station was only one of a number of other broadcast facilities in the area (App., pp. 159a-160a, par. 34), although the need for new, independent sources of public information, and not monopoly, has been the principle in considering this criterion.[39]

The prejudice to an applicant in shifting the meaning and weight of criteria in the final decision is clear and direct. Established criteria serve as the law of the case, the legal framework and points of relevant reference under which the case is tried. If the agency, after hearing, applies new or distorted criteria, under the guise of established criteria, to the facts of record, then in every practical and meaningful sense the party has been deprived of its right to a fair hearing and to cross-examination, the right to present evidence on its behalf and to probe and test the direct testimony offered by its opponent, within the ambit and periphery of the relevant facts and the applicable law. Certainly elementary fair play would require as a minimum that a case tried under one body of established criteria be remanded for further proceedings, if there is to be a change in the ground rules, the criteria which are to govern the decision.

The basic principle applicable was succinctly summarized in *National Labor Relations Board* v. *Mall Tool Co.*:[40] "Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily."

[39] *Id.*, at 138. Cf. *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, note 35 *supra*.

[40] 119 F. 2d 700, 702 (7th Cir., 1941).

(3) The Court of Appeals has reduced the "substantial evidence" rule of Section 10(e) of the Administrative Procedure Act,[41] to a requirement that the Court must find that the agency has "touched base" on the points raised, and elicit some rational basis for decision, however plainly wrong the decision upon the whole record and clearly right the choice of the competing applicant.[42] By a disclaimer of authority, the Court has permitted to stand a Commission decision that the public interest would be better served by the grant of a broadcast facility to an applicant because (1) its principals showed civic activities "of the highest order" and (2) its operation of a radio station for a brief period was not offensive, a matter admittedly of minor significance, despite these factors favoring the other applicant: (1) 50 stockholders, having a 62.67% interest in the successful applicant, had surrendered management responsibility to 11 voting trustees, only two of whom would participate in full-time operation, while all of the other applicant's principals would participate in operation, four of them (with an 88.89% stock interest) full-time; (2) the unsuccessful applicant's principals had also made substantial contributions to civic causes; and (3) only the unsuccessful applicant offered a new, independent voice in broadcasting. When the basic determinations of decisional significance are thus stripped to their elements, an abiding and unalterable conclusion must remain that a fundamental mistake has been made.

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[41] Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C., § 1009 (e).

[42] Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951).

CONCLUSION

The plain import of the decision here sought to be reviewed is that the Court of Appeals has now washed its hands of all responsibility in the administrative process to require an adherence to the Rule of Law in the conduct of adjudicatory proceedings, so long as the full trappings of formal ritual are preserved in the regulatory agency's decision: if the agency decision is internally consistent, then it need bear no relation to any coherent, cohesive, orderly body of agency law; if the findings and "reasoning" of the agency are stated therein, then it is not a matter of judicial cognizance that the result is patently erroneous.

With this ruling, the regulatory agency is now free without the tempering influence of judicial restraint to pick and choose among shifting criteria, however unresponsive to the agency's statutory directions and duties, or to the legal and lay concept that there should be an element of predictability in the law.[43] If the decision is to stand, then the last hope for establishing an orderly body of continuing principles which may be applied from case to case must sink into the morass that is currently communications law. Similarly foredoomed must be any hope for fundamental justice in the administrative process if an agency decision may stand without effective appellate review so long as it is not irrational, even though deemed clearly wrong.

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[43] Compare Cardozo, The Growth of the Law, 52 (Selected Writings, 207)

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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